

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Donald Thuillard and Mary  
Thuillard,  
  
Plaintiffs,

v.

UNITED STATES OF AMERICA "UNITED  
STATES CUSTOMS AND BORDER  
SECURITY",  
  
Defendant.

No. CV-04-368-FVS

ORDER

**THIS MATTER** is before the Court pursuant to the Defendant's Motion to Dismiss and Alternatively for Summary Judgment (Ct. Rec. 34). Plaintiffs are proceeding *pro se*. Defendant is represented by Pamela DeRusha.

**I. BACKGROUND**

Plaintiff Mary Thuillard was a Senior Customs Inspector for the United States Customs Service (now U.S. Customs and Border Protection) (hereinafter "Customs") in Frontier, Washington from February 1994 to February 2003. In the Fall of 2000, Customs received information that Mrs. Thuillard may have engaged in improper or illegal activities in connection with her employment.<sup>1</sup> Specifically, Customs received

---

<sup>1</sup> Plaintiffs contend these allegations were "generated by a Customs Inspector who was in position to be eligible for advancement and substantial gain through the removal of Inspector Thuillard from her position." However, the source of these allegations does not present a material issue of fact with

1 information that at some time in 1998 Mrs. Thuillard allowed printer  
2 ink to enter the United States without payment of proper Customs  
3 duties and/or fees. Further, Customs received information that Mrs.  
4 Thuillard's husband, Plaintiff Donald Thuillard, brought the ink into  
5 the United States from Canada, without properly declaring it and  
6 without paying appropriate Customs duties and/or fees. After  
7 receiving this information, Customs Internal Affairs initiated an  
8 administrative investigation. Before Internal Affairs completed its  
9 investigation, on April 10, 2002, a federal grand jury indicted Mrs.  
10 Thuillard in the United States District Court for the Eastern District  
11 of Washington. Count 1 of the indictment charged Mrs. Thuillard with  
12 fraudulently and knowingly concealing and facilitating the  
13 transportation of merchandise (ink) imported contrary to law, in  
14 violation of 18 U.S.C. §§ 545 and 2.

15 Pursuant to its own regulations, Customs suspended Mrs. Thuillard  
16 indefinitely. Customs also suspended its administrative investigation  
17 pending a final determination in the criminal case. Mrs. Thuillard  
18 appealed Customs' decision to indefinitely suspend her to the Merit  
19 Systems Protection Board ("MSPB"), but on her request, the appeal was  
20 dismissed without prejudice and with leave to refile, pending the  
21 resolution of the criminal case. On September 9, 2002, the district  
22 court dismissed the indictment against Mrs. Thuillard after finding  
23 that her vehicle did not qualify as a commercial vehicle under the  
24 criminal statute.

25 Shortly thereafter, Customs returned Mrs. Thuillard to pay  
26 

---

respect to the resolution of the present motion.

1 status, but then placed her on administrative leave while it  
2 considered whether further administrative action or investigation was  
3 warranted. On February 4, 2003, Customs' Internal Affairs agents  
4 interviewed Mrs. Thuillard in an attempt to determine whether she had  
5 violated the U.S. Customs Code of Conduct.<sup>2</sup> On February 5, 2003, Mrs.  
6 Thuillard submitted a letter of resignation.<sup>3</sup> Thereafter, Mrs.  
7 Thuillard filed no further claims with the MSPB. In August 2003, Mrs.  
8 Thuillard submitted a Claim for Financial Damages with Customs. That  
9 claim was denied on April 5, 2004.

10 Plaintiffs filed this action against Customs, alleging its  
11 supervisors and agents maliciously prosecuted Mrs. Thuillard and  
12 thereafter maliciously and wrongfully pursued an administrative  
13 investigation against her. Specifically, Mrs. Thuillard alleges she  
14 was falsely and unfairly accused of misconduct arising from her  
15 employment and unfairly interrogated by Customs over those allegations  
16 of misconduct. Although it is difficult to discern from the  
17 Complaint, Plaintiffs appear to assert additional causes of action for

---

18 <sup>2</sup> Plaintiffs allege this "interrogation was carried out in  
19 complete 'Contempt of Court' since the indictments [in the  
20 criminal case] had been 'Dismissed with Prejudice' [.]"  
21 Plaintiffs' Response to Defendant's Statement of Material Facts,  
22 at 4:9-10. However, the materials submitted to the Court  
23 indicate Mrs. Thuillard was advised that the continued  
investigation and interview conducted on February 4, 2003, was  
administrative in nature and not related to possible criminal  
misconduct.

24 <sup>3</sup> Plaintiffs acknowledge Mrs. Thuillard resigned, but they  
25 allege she resigned "under extreme duress and harassment designed  
26 to force her to resigne [sic]." Plaintiffs' Response to  
Defendant's Statement of Material Facts, at 4:12-14. This  
allegation provides the basis for several claims in Plaintiffs'  
Complaint.

1 defamation, malicious harassment, false accusation, and wrongful  
2 discharge. Further, Plaintiffs' Amended Complaint asserts additional  
3 claims for constructive discharge and emotional distress. As a result  
4 of these actions, Plaintiffs allege they have suffered financial  
5 difficulties and they seek (1) monetary compensation in the amount of  
6 \$28,578,600.00, (2) a letter acknowledging that Mrs. Thuillard's  
7 employer took inappropriate actions, (3) a correction to Mrs.  
8 Thuillard's employment records reflecting that she "retired" instead  
9 of "resigned", (4) and Mrs. Thuillard's old badge to be returned to  
10 her mounted on a plaque. Defendant moves to dismiss these claims for  
11 failure to state a claim upon which relief can be granted. In the  
12 alternative, Defendant moves for summary judgment on Plaintiffs' claim  
13 of malicious harassment.

## 14 **II. DISCUSSION**

15 As a preliminary matter, the Court notes that the Supreme Court  
16 has "instructed the federal courts to liberally construe the 'inartful  
17 pleading' of *pro se* litigants." *Eldridge v. Block*, 832 F.2d 1132,  
18 1137 (9th Cir. 1987) (quoting *Boag v. MacDougall*, 454 U.S. 364, 365,  
19 102 S.Ct. 700, 701, 70 L.Ed.2d 551 (1982)). In this action, Plaintiffs  
20 are proceeding *pro se*.

### 21 **A. Standard of Review**

22 A complaint should not be dismissed for failure to state a claim  
23 upon which relief may be granted under Federal Rule of Civil Procedure  
24 12(b)(6) unless it "appears beyond doubt that the plaintiff can prove  
25 no set of facts in support of his claim which would entitle him to  
26 relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2

1 L.Ed.2d 80 (1957); *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir.  
2 1997). When the legal sufficiency of a complaint's allegations are  
3 tested with a motion under Rule 12(b)(6), "[r]eview is limited to the  
4 complaint." *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th  
5 Cir. 1993). All factual allegations set forth in the complaint are  
6 taken as true and construed in the light most favorable to the  
7 plaintiff. *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir.  
8 1996). The Court must give the plaintiff the benefit of every  
9 inference that reasonably may be drawn from well-pleaded facts. *Tyler*  
10 *v. Cisneros*, 136 F.3d 603, 607 (9th Cir. 1998).

11 A moving party is entitled to summary judgment when there are no  
12 genuine issues of material fact in dispute and the moving party is  
13 entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Celotex*  
14 *Corp. v. Catrett*, 477 U.S. 316, 323, 106 S.Ct. 2548, 2552 (1986). "A  
15 material issue of fact is one that affects the outcome of the  
16 litigation and requires a trial to resolve the parties' differing  
17 versions of the truth." *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306  
18 (9th Cir. 1982). Inferences drawn from facts are to be viewed in the  
19 light most favorable to the non-moving party, but that party must do  
20 more than show that there is some "metaphysical doubt" as to the  
21 material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S.  
22 572, 586-87, 106 S.Ct. 1348, 1356 (1986). There is no issue for trial  
23 "unless there is sufficient evidence favoring the non-moving party for  
24 a jury to return a verdict for that party." *Anderson v. Liberty*  
25 *Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511 (1986). A mere  
26 "scintilla of evidence" in support of the non-moving party's position

1 is insufficient to defeat a motion for summary judgment. *Id.* at 252,  
2 106 S.Ct. at 2512. The non-moving party cannot rely on conclusory  
3 allegations alone to create an issue of material fact. *Hansen v.*  
4 *United States*, 7 F.3d 137, 138 (9th Cir. 1993). Rather, the non-  
5 moving party must present admissible evidence showing there is a  
6 genuine issue for trial. Fed.R.Civ.P. 56(e); *Brinson v. Linda Rose*  
7 *Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995). An issue of fact  
8 is genuine if the evidence is such that a reasonable jury could return  
9 a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248, 106  
10 S.Ct. at 2510. "If the evidence is merely colorable...or is not  
11 significantly probative,...summary judgment may be granted." *Id.* at  
12 249-50, 106 S.Ct. at 2511 (citations omitted).

13 **B. Jurisdiction**

14 Plaintiffs' Complaint does not identify the basis for this  
15 Court's jurisdiction. Whether the United States has waived its  
16 sovereign immunity is a question of the Court's subject matter  
17 jurisdiction. *United States v. Sherwood*, 312 U.S. 584, 61 S.Ct. 767,  
18 769, 85 L.Ed. 1048 (1941) ("[T]he terms of [the United States']  
19 consent to be sued in any court define that court's jurisdiction to  
20 entertain the suit."). Under the principle of sovereign immunity, the  
21 United States may only be sued where it has expressly consented to  
22 such suit by statute. *Block v. North Dakota*, 461 U.S. 273, 287, 103  
23 S.Ct. 1811, 1820, 75 L.Ed.2d 840 (1983). A suit against a federal  
24 agency which seeks relief against the sovereign is, in effect, a suit  
25 against the sovereign. *Larson v. Domestic & Foreign Commerce Corp.*,  
26 337 U.S. 682, 687-88, 69 S.Ct. 1457, 1460-61, 93 L.Ed. 1628 (1949).

1 Accordingly, the principles of sovereign immunity apply to that  
2 agency. *Id.*; *Beller v. Middendorf*, 632 F.2d 788, 796 (9th Cir. 1980).  
3 A party suing the United States must point to an unequivocal waiver of  
4 sovereign immunity. *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir.  
5 1983). Plaintiffs' Complaint does not identify an unequivocal waiver  
6 of immunity. Plaintiffs allege various tort claims in their Complaint  
7 against Customs. These claims include malicious prosecution,  
8 malicious harassment, defamation, false accusation, wrongful  
9 discharge, constructive discharge, and emotional distress.

10 The Federal Tort Claims Act ("FTCA") waives the United States'  
11 sovereign immunity for tortious acts for which a private person would  
12 be liable in similar circumstances.<sup>4</sup> The FTCA specifically provides  
13 that claims arising out of assault, battery, false imprisonment, false  
14 arrest, malicious prosecution, abuse of process, libel, slander,  
15 misrepresentation, deceit, or interference with contract rights" are  
16 not covered by the FTCA with the exception that the torts of "assault,  
17 battery, false imprisonment, false arrest, abuse of process, or  
18 malicious prosecution" are actionable if based on the acts of an  
19 "investigative or law enforcement officer." 28 U.S.C. 2680(h). The  
20 statute defines "investigative or law enforcement officer" to include  
21 "any officer of the United States who is empowered by law to execute  
22

---

23 <sup>4</sup> Section 2675(a) of Title 28 prohibits the institution of  
24 an action of a claim under the FTCA prior to the final  
25 disposition of the claim by the appropriate federal agency. 28  
26 U.S.C. § 2675(a). Plaintiffs filed a Claim for Financial Damages  
with U.S. Customs and Border Protection. This action was  
dismissed. Thus, it appears Plaintiffs satisfied the procedural  
requirements of the FTCA.

1 searches, to seize evidence, or to make arrests for violations of  
2 Federal law.” *Id.* The Defendant admits that U.S. Customs and Border  
3 Protection officers are considered investigative or law enforcement  
4 officers according to the statute. Therefore, some of Plaintiffs’  
5 claims against the United States based on actions of Customs’ agents  
6 can be considered under the FTCA.

7 Under the FTCA, state law determines the liability of an  
8 individual defendant. 28 U.S.C. § 1346(b); *United Scottish Insurance*  
9 *Co. v. United States*, 614 F.2d 188, 193 (9th Cir. 1979). Since the  
10 present cases involves allegations of tortious conduct in Washington,  
11 Washington state law applies.

### 12 **C. Civil Service Reform Act**

13 With the exception of the malicious prosecution claim, Defendant  
14 moves to dismiss all of Plaintiffs’ claims for lack of subject matter  
15 jurisdiction. Specifically, Defendant argues the Court lacks subject  
16 matter jurisdiction over these claims because the alleged wrongful  
17 acts of the Customs’ officers fall within the ambit of the Civil  
18 Service Reform Act (CSRA) (codified in various sections of 5 U.S.C.).  
19

20 The CSRA precludes judicial review of the federal government’s  
21 employment actions or practices except that which is provided by the  
22 act itself. *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d  
23 648 (1983) (aerospace engineer’s claims against federal space flight  
24 center for defamation and retaliatory demotion were dismissed because  
25 they arose out of employment relationship that was governed by CSRA).  
26 Specifically, the “CSRA limits federal employees challenging their



1 supervisors 'prohibited personnel practices' to an administrative  
2 remedial system." *Mahtesian v. Lee*, 406 F.3d 1131, 1134 (9th Cir.  
3 2005). If the conduct that Plaintiffs challenge in this action falls  
4 within the scope of the CSRA's "prohibited personnel practices," then  
5 the CSRA's administrative procedures are Plaintiffs' only remedy, and  
6 this Court cannot resolve Plaintiffs' claims. "The CSRA defines  
7 'prohibited personnel practices' as any 'personnel action' taken for  
8 an improper motive by someone who has authority to take personnel  
9 actions." *Id.* (citing 5 U.S.C. § 2303(b)). "Personnel action"  
10 includes any appointment, promotion, and disciplinary or corrective  
11 action. 5 U.S.C. § 2302(a)(2)(A)(I)-(xi).

12 Here, Customs' administrative investigation into allegations of  
13 misconduct by Mrs. Thuillard falls squarely within the interpreted  
14 meaning of "personnel actions." The allegations of misconduct against  
15 Mrs. Thuillard were related to her employment and job responsibilities  
16 as a Customs Inspector. She was alleged to have allowed merchandise  
17 into the United States from Canada without proper processing and  
18 payment of duties and fees while employed as a Customs Inspector and  
19 to have engaged in a business enterprise without prior notice to  
20 Customs and in conflict with her position as a Customs Investigator.  
21 As a result of these allegations, an investigation was commenced in  
22 accordance with Customs' administrative policy and procedure to  
23 determine if disciplinary action was appropriate. Mrs. Thuillard was  
24 also interviewed as part of this investigation. With the exception of  
25 the allegations supporting Plaintiffs' claim for malicious  
26 prosecution, the allegations in Plaintiffs' Complaint all arise out of

1 personnel actions and decisions related to Customs' decision to  
2 conduct an administrative investigation and the manner in which the  
3 investigation was conducted. Thus, Plaintiffs' claims for defamation,  
4 false accusation, wrongful discharge, constructive discharge, and  
5 emotional distress fall within the CSRA. Consequently, the Court  
6 lacks subject matter jurisdiction over these claims and they are  
7 dismissed.<sup>5</sup> See e.g., *Saul v. United States*, 928 F.2d 829, 831 (9th  
8 Cir. 1991) (dismissing federal employee's claims against supervisor  
9 for violation of constitutional rights, invasion of privacy,  
10 defamation, and intentional and negligent infliction of emotional  
11 distress because the CSRA precludes state tort claims from the realm  
12 of federal employment); *Mahtesian*, 406 F.3d 1131 (federal employee's  
13 claims for defamation, interference with employment interest and  
14 invasion of privacy preempted by CSRA).

15 **D. Malicious Prosecution**

16 Plaintiffs' claim for malicious prosecution falls outside the  
17 ambit of the CSRA because it does not evolve out of Mrs. Thuillard's  
18 employment relationship with Customs. Under Washington law, which  
19 relies on common law, a malicious prosecution claim arising from a  
20 criminal action requires the plaintiff to prove the following  
21 elements:  
22

23 (1) that the prosecution claimed to have been malicious was  
24 instituted or continued by the defendant; (2) that there was

---

25 <sup>5</sup> Any other claims involving personnel actions and decisions  
26 relating to the administrative investigation, that Plaintiffs  
attempt to assert in the Complaint, are also preempted by the  
CSRA and shall be dismissed.

1 want of probable cause for the institution or continuation  
2 of the prosecution; (3) that the proceedings were instituted  
3 or continued through malice; (4) that the proceedings  
4 terminated on the merits in favor of the plaintiff, or were  
5 abandoned; and (5) that the plaintiff suffered injury or  
6 damage as a result of the prosecution.

7 *Clark v. Baines*, 150 Wash.2d 905, 912, 84 P.3d 245, 249 (2004)  
8 (citation omitted). Although the malicious prosecution plaintiff must  
9 prove all required elements, malice and want of probable cause  
10 constitute the gist of a malicious prosecution action. *Id.* Proof of  
11 probable cause is an absolute defense to a claim for malicious  
12 prosecution. *Id.*

13 Under Washington law, a malicious prosecution plaintiff  
14 establishes a prima facie case that there was no probable cause by  
15 proving that the criminal proceedings were dismissed or terminated in  
16 her favor. *Pallett v. Thompkins*, 10 Wash.2d 697, 699, 118 P.2d 190,  
17 191 (1941). But, the defendant may rebut that prima facie case, and  
18 prove probable cause as a matter of law, by demonstrating that before  
19 instituting criminal proceedings the defendant made to the prosecutor  
20 a good faith, full and fair disclosure of all of the material facts  
21 known and the prosecutor then chose to initiate a criminal charge.  
22 *Brooks v. Bolde*, 11 Wash.2d 37, 39, 118 P.2d 193, 194 (1941); *Hayes v.*  
23 *Sears, Roebuck & Co.*, 34 Wash.2d 666, 680, 290 P.2d 468, 475 (1949).  
24 In a federal prosecution, a grand jury, rather than the prosecutor,  
25 determines the existence of probable cause. *McCarthy v. Mayo*, 827  
26 F.2d 1310, 1316 (1987).

Here, Plaintiffs have made a prima facie case for want of  
probable cause since the indictment charging Mrs. Thuillard was

1 dismissed with prejudice. However, this prima facie showing is  
2 refuted by the fact that the grand jury determined that probable cause  
3 existed when it indicted Ms. Thuillard. The grand jury's  
4 determination of probable cause is a barrier to Plaintiffs' ability to  
5 state a claim of malicious prosecution based on the fact of Mrs.  
6 Thuillard's federal prosecution. See *McCarthy v. Mayo*, 827 F.2d 1310,  
7 1316 (1987) (holding that federal grand jury's determination of  
8 probable cause is a barrier to plaintiff's ability to state a claim of  
9 malicious prosecution). The record contains no other evidence  
10 demonstrating lack of probable cause. Plaintiffs only argue that the  
11 order dismissing the indictment with prejudice established "want of  
12 probable cause". Therefore, Plaintiffs' claim for malicious  
13 prosecution is dismissed.

14 ***E. Malicious Harassment***

15 Defendant contends Plaintiffs' claim for malicious harassment is  
16 barred by the CSRA because the allegations supporting this claim  
17 involve personnel actions related to Customs' decision to conduct an  
18 administrative investigation. "Personnel action" includes any  
19 appointment, promotion, and disciplinary or corrective action. 5  
20 U.S.C. § 2302(a)(2)(A)(I)-(xi). With respect to Plaintiffs' claim for  
21 malicious harassment, Plaintiffs' allege that during the  
22 administrative interview, Customs Agents Paul Anderson and David Hynes  
23 ordered Mrs. Thuillard "to sign under threat of punishment" a "GAG  
24 Order." Complaint, at ¶ 3, 4.

25 However, even if Plaintiffs' claim for malicious harassment is  
26 not preempted by the CSRA, Defendant argues that it has not waived its

1 sovereign immunity with respect to this tort because the FTCA is  
2 silent on a claim for malicious harassment when allegedly committed by  
3 a law enforcement officer acting in a law enforcement capacity. See  
4 *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092 (1996) ("A waiver of  
5 the Federal Government's sovereign immunity must be unequivocally  
6 expressed in statutory text, and will not be implied[.]").

7 The FTCA does not explicitly waive the United States' sovereign  
8 immunity as to the intentional tort of malicious harassment, when  
9 allegedly committed by a law enforcement officer acting in a law  
10 enforcement capacity. Moreover, the Court is aware of no other  
11 authority waiving the United States' sovereign immunity as to this  
12 tort. However, to the extent Plaintiffs' claim for malicious  
13 harassment is permissible under the FTCA, the Court dismisses the  
14 claim because Plaintiffs have not alleged facts, which, if true,  
15 constitute a claim of malicious harassment.

16 Washington state law recognizes the availability of a civil tort  
17 action for malicious harassment and it mirrors the elements of the  
18 criminal action for malicious harassment found at RCW 9A.36.080. See  
19 Wash.Rev.Code Ann. § 9A.36.080; *Ziegler v. Ziegler*, 28 F.Supp.2d 601,  
20 618 (E.D. Wash. 1998). Malicious harassment includes the malicious  
21 and intentional infliction of physical injury, physical damage to  
22 property, or threats of harm which leave a person in reasonable fear  
23 of harm, and which is motivated by the perpetrator's "perception of  
24 the victim's race, color, religion, ancestry, national origin, gender,  
25 sexual orientation, or mental, physical, or sensory handicap[.]"  
26 Wash.Rev.Code Ann. § 9A.36.080. Thus, Plaintiffs must allege and

1 prove that Customs' law enforcement agents intentionally and  
2 maliciously harmed Plaintiffs physically, damaged Plaintiffs'  
3 property, or threatened Plaintiffs because of their association with  
4 one of the identified group classifications. However, Plaintiffs'  
5 Complaint does not allege physical harm, damage to property, or  
6 threats of physical harm based on their gender, race, color, religion,  
7 sexual orientation, or handicap. Therefore, because Plaintiffs'  
8 Complaint does not allege any facts, which, if proven, could state a  
9 claim for malicious harassment under Washington law, the claim is  
10 dismissed. Accordingly,

11 **IT IS HEREBY ORDERED:**

- 12 1. Defendant's Motion to Dismiss and Alternatively for Summary  
13 Judgment (**Ct. Rec. 34**) is **GRANTED**. Plaintiffs' Complaint is  
14 **DISMISSED**.
- 15 2. Plaintiffs' Motion for Order to Show Cause and Motion to Set  
16 Aside Defendant's Motion to Dismiss and Alternative for  
Summary Judgment (**Ct. Rec. 43**) is **MOOT**.
- 17 3. Plaintiffs' Motion for Extension of Time to File Response /  
18 Reply (**Ct. Rec. 54**) is **MOOT**.
- 19 4. Plaintiffs' Motion to Expedite (**Ct. Rec. 56**) is **MOOT**.

20 **IT IS SO ORDERED.** The District Court Executive is hereby  
21 directed to enter this Order, furnish copies to counsel, and **CLOSE THE**  
22 **FILE.**

23 **DATED** this 26th day of January, 2006.

24  
25 s/ Fred Van Sickle  
26 Fred Van Sickle  
United States District Judge